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IN THE

Supreme Court of the United States

OCT. TERM, 1957

No. ~~1077~~ 182

LIEBERMAN-KOREN CORP., and SYLVIA KAPNER,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LIEBERMAN-KOREN CORP.,
and SYLVIA KAPNER
Petitioners PRO SE
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16 Court Street
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To the Honorable Supreme Court of the United States:

Petitioners, Lieberman-Koren Corp. and Sylvia Kapner, respectfully pray for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the decision of said Court rendered the 18th day of April, 1957.

Jurisdiction

This Court has jurisdiction to review said decision under 28 U. S. Code 1254(1).

Judgment

The judgment herein was rendered in the United States District Court for the Eastern District of New York on November 17, 1955, finding the defendants guilty of violation of Title 29, U. S. C., Sections 207, 215(a)(2); 215(a)(5) and 216(a); and of 215(a)(1) and 216(a). The District Judge sentenced the defendants to pay a fine to wit: $1,000.00 on each of three counts for the corporation and $250.00 on each of three counts for the individual petitioner, or an aggregate of $3,000.00 for the former and $750.00 for the latter.

The Circuit Court of Appeals for the Second Circuit affirmed the judgment on appeal with the following per curiam opinion:

> "There was adequate evidence, presented by the employees themselves, that they had worked overtime for the defendant corporation—of which the individual defendant was the sole office employee and bookkeeper—and that they had not been paid the overtime wages required by law. Testimony from them was obviously necessary and appropriate, since the defendants controlled the corporate books. Denial of the defendants' motion for a bill of particulars was quite proper, particularly in view of the extensive details supplied defendants by the United States Attorney. There was no error in the admission of testimony, including a defense witness' prior statement, with a portion shown to have been deleted, as it had been because of defense objections. The trial conduct of the prosecuting attorney was unexceptionable and the judge's charge fair and adequate. The appeal is quite without merit."

A petition for rehearing was denied on May 13, 1955.

The Statute Involved

The prosecution herein arose under alleged violations of the provisions of Title 29, U. S. C. Sections 207, 215(a)(2) and 216(a), in that the petitioners allegedly employed persons in interstate commerce for work weeks longer than 40 hours without paying one and one-half times the regular rate of pay for hours worked in excess of 40 hours; Sections 215(a)(5) and 216(a) for allegedly keeping false records and Sections 215(a)(1) and 216(a) for making shipments in interstate commerce in violation of the statute. The statute is known as the Fair Labor Standards Act.

The Facts

The information covered a period from March 1, 1951 to December 5, 1952. It was claimed that employees of the corporation worked hours in excess of 40 hours during work weeks without being paid time and one-half for the excess hours so worked. The violation of the record keeping provisions of the statute arose because it was claimed that the corporate records did not show overtime worked during the period mentioned. The third count followed by reason of the claimed violation of the first two counts.

The record is barren of any proof that any of the employees of the corporation worked more than forty hours in any work week without being compensated as required by law. The violation of the second count was inferred from the findings as to the first count, since it must have been reasoned that if the men in fact worked more than 40 hours in any week without being paid for overtime and the records failed to reflect such work, then the records were false.

There was no proof that any of the witnesses worked more than 40 hours in any work week, nor that any of the records kept were false.

The decision of the Circuit Court that the records were in charge of the corporation obviously shows the inference reached by that Court that ipso facto such records were false. This reasoning unlawfully shifted the burden of proof to the defendants, contrary to law. There was no burden on the defendants to show that the records were correct.

There was serious error committed by the trial court in charging the jury as follows:

> "The offense charged is a course of conduct. The Government need not prove specific dates or hours worked by employees."

This charge was based upon the decision of the Supreme Court of the United States in the case of *U. S.* v. *Universal C. I. T. Corp.*, 344 U. S. 218, where a question of pleading was decided. The language used there at page 224, is:

> "The offense made punishable under the Fair Labor Standards Act is a course of conduct."

It was never intended by that language to set up a standard of proof.

The Questions

Petitioners believe that the courts below have decided an important question of Federal Law which has not been but should be decided by this Court. I.e., is it sufficient, under the *Universal C. I. T.* case (*supra*) to offer general statements showing an alleged course of conduct without any proof of hours worked during specific weeks?

Petitioners also believe that the Trial Court below has so far departed from the accepted and usual course of judicial proceedings by permitting the case to go to the jury without any proof as to be shocking; and the Circuit Court has so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. This latter action is evidenced by the cursory dismissal of the questions raised on appeal in the Circuit Court.

Reasons for Granting This Writ

The effect of the affirmance by the Circuit Court of the judgment of conviction is to leave open to prosecution and conviction every employer in the United States, and particularly in the Second Circuit, upon no evidence as to violations of the Fair Labor Standards Act. If the law established by this case is permitted to stand, there will be no need for the government to prove that any person worked more than 40 hours in any work week and was not paid overtime rates. All that will be necessary is a willingness by witnesses, whether learned, ignorant or illiterate, to testify that they worked more than 40 hours, at some time or other, without being able to state when, and on

such testimony a court will send a case to a jury and permit a conviction to stand.

Every employer is in jeopardy so long as such a rule of law is permitted to exist.

While a "course of conduct" may constitute a crime nevertheless the proof of that crime must depend upon common law proof of its commission. The record of the trial of this case fails to show any proof of the commission of any crime.

The granting of the writ prayed for here will open the record for review by this Court and present an opportunity to settle the questions of law as to whether it is sufficient to show only a course of conduct in order to prove a violation of the Fair Labor Standards Act.

WHEREFORE your petitioners pray that a writ of certiorari may be issued by this Court.

Sylvia Kapner

LIEBERMAN-KOREN CORP.
SYLVIA KAPNER
Petitioners

STATE OF NEW YORK,
COUNTY OF KINGS, *ss.*:

SYLVIA KAPNER being duly sworn, deposes and says that she is one of the petitioners herein; that she has read the foregoing petition and knows the contents thereof; that the same is true to her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

Sylvia Kapner

Sworn to before me this
10 day of June, 1957.

Notary Public, State of New York
No. 41-2033700
Qualified in Queens County
Commission Expires March 30, 1959

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PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
Attorney,
Department of Justice, Washington 25, D. C.

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 2) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 18, 1957. A petition for rehearing was denied on May 13, 1957. The petition for a writ of certiorari was filed on June 11, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the testimony of employees concerning overtime work without overtime pay was sufficient to

establish violations of the Fair Labor Standards Act, even though the employees could not specify the exact hours of overtime in particular weeks.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060), as amended by the Fair Labor Standards Amendments of 1949 (63 Stat. 910), are:

Section 7 (a) (29 U. S. C. 207 (a)):

> (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 11 (c) (29 U. S. C. 211 (c)):

> (c) Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder.

Section 15 (a) (1), (2), and (5) (29 U. S. C. 215 (a) (1), (2), and (5)):

> (a) * * * it shall be unlawful for any person—
>
> (1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7 of this Act, * * *.
>
> (2) to violate any of the provisions of section 6 or section 7 of this Act, * * *.
>
> (5) to violate any of the provisions of section 11 (c) of this Act, * * *.

Section 16 (a) (29 U. S. C. 216 (a)):

> (a) Any person who willfully violates any of the provisions of section 15 of this Act shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

STATEMENT

Petitioners were convicted in the United States District Court for the Eastern District of New York upon three counts of an information charging violations of the Fair Labor Standards Act between March 1951 and December 1952 by (1) willfully failing to pay proper overtime wages; (2) keeping false records; and (3) shipment in interstate commerce of goods made by persons not properly paid

(R. 3–4).[1] The corporation was fined a total of $3,000, and the individual petitioner (who was secretary-treasurer of the corporation and its only office employee (Tr. 1, 8–19)) a total of $750 (R. 12–13). On appeal the convictions were unanimously affirmed.

The corporation was engaged in shipping scrap metal in interstate commerce (Tr. 14, 26–27, 242). Five witnesses testified for the government that, during the period covered by the information, they frequently worked more than forty hours per week but were paid in cash by the individual petitioner at the normal hourly rate for all time worked (Tr. 86, 89, 136, 140, 209, 210–211, 252, 257–258).

The witnesses could not give exact hours and dates. One testified that, although his regular hours were from eight to five Mondays to Fridays, he had sometimes worked as late as ten or eleven at night (Tr. 81–82). He worked some Saturdays in addition to his regular five days (Tr. 85, 122). Another testified that he worked every Saturday unless the weather was bad (Tr. 133–134) and some weeks he worked as much as 68 to 70 hours (Tr. 135). A third testified that he "never stopped at forty hours, unless it was bad weather" (Tr. 211). Still another testified that although the regular leaving time was five o'clock he often stayed until six or seven o'clock when there was a rush of peddlers (Tr. 255–256). This witness worked Saturdays about ten or twelve times (Tr. 256). Three witnesses testified that each separately had

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[1] "R" refers to the printed record filed by petitioner. "Tr." refers to the transcript at the trial which is being lodged with the Clerk.

asked the president of the corporation, Morris Lieberman, who died before trial (Tr. 2), to pay them time and a half for overtime, and that in each instance Lieberman had answered that he could not afford to pay any more (Tr. 141, 212, 259). Lieberman told one witness "a man wasn't worth more at one hour to him than he was at another one." (Tr. 259.)

The payroll records of the corporation purported to show that no employee had worked more than 40 hours in a week and that none of the government witnesses had worked on Saturday before September 1952. (Gov. Ex. 2, 3, 4; Tr. 22–24, 30–31, 49, 52, 68–69).[2] In November, 1950, shortly before the period covered by the information, an investigator of the Department of Labor had had a conference with the individual petitioner at which he had explained to her the time-and-a-half and record-keeping requirements of the Fair Labor Standards Act (Tr. 11–13).

In submitting the case to the jury, the judge charged that, to convict, it must find beyond a reasonable doubt that petitioners knowingly and willfully failed to pay time and a half for overtime beyond 40 hours (R. 61–62) and knowingly and willfully kept false records (R. 62). He charged on the presumption of innocence, reasonable doubt, and the nature of circumstantial evidence (R. 63–64), saying that "[s]uspicions, surmises and speculations should not enter into your deliberations" (R. 64). He also charged that the offense proscribed "is a course of

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[2] There was a strike in the fall of 1952 (Tr. 146) and the yard was unionized in December 1952 (Tr. 70).

conduct" and that the government "need not prove specific dates or hours worked by employees" (R. 61).

ARGUMENT

Petitioners argue that since the government evidence did not show, and the judge charged the jury that the government need not prove, the specific weeks or hours in which the employees worked overtime, the evidence was insufficient to support their convictions. There was, however, ample evidence which justified the jury in concluding that the employees had often worked overtime, that the petitioners were aware of that fact, and had deliberately falsified the books to conceal the true facts. This was ample to establish an offense under the Fair Labor Standards Act which, in its criminal aspects, punishes a course of conduct, rather than specific violations as to particular weeks. *United States* v. *Universal C. I. T. Corporation*, 344 U. S. 218, 224. While that decision did, as petitioners point out, deal with the proper method of pleading the offense, rather than with the sufficiency of proof, its holding that the whole course of action, rather than each weekly work unit, constitutes the crime also necessarily establishes the elements of the offense which must be proved.

Even with respect to a civil action for damages, where the amount of overtime must be more precisely proved to form a basis of computation, this Court has pointed out that the employer should not obtain a premium from his failure to keep proper records, thus being in a position to assert that the employee has not established the hours worked with

sufficient accuracy. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, 687–688. The Court said that "an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." And further, "[t]he employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of § 11 (c) of the Act." In the present case, where the exact amount of the underpayment is of no significance so long as the underpayment and false recording were willfully done, it is manifest that all that is necessary is sufficient evidence to establish that there was a willful contravention of the Act. The evidence here did establish that fact beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. Lee Rankin,
Solicitor General.
Warren Olney III,
Assistant Attorney General.
Beatrice Rosenberg,
Attorney.

July 1957.

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